

Fox Television Stations, Inc., 8 FCC Rcd 2361, 2366-68, recon. denied, 8 FCC Rcd 3583 (Rev. Bd.), modified, 9 FCC Rcd 62 (1993), aff'd sub nom. Rainbow Broadcasting, Inc. v. FCC, ____ F.3d.____, 1995 U.S. App. LEXIS 8736 (D.C. Cir. 1995) (Table).

b. **Ascertainment of Community Needs and Interests**

133. The Commission eliminated all formal ascertainment requirements for television licensees in 1984, when it deregulated television. See Revision of Programming and Commercialization Policies, 98 FCC 2d 1076 (1984). However, stations are required to identify significant community issues and to tabulate those issues in a quarterly issues/programs list. Fox Television Stations, *supra*, 8 FCC Rcd at 2372-74.

134. From 1989-90, WTVE's ascertainment primarily took the form of staff referrals from local community leaders and organizations and review of literature from community organizations. In the early 1990's, Reading revamped its ascertainment process. WTVE's staff was instructed to poll local business leaders, contact community organizations and review and summarize articles from the Reading Times/Eagle. The station's ascertainment efforts combined these methods with review of literature from community organizations and discussions with visitors to the studio. WTVE's quarterly issues and programs lists document dozens of meetings and discussions with a broad range of community organizations, community

leaders and companies during the license term. In addition, WTVE conducted children's ascertainment through school visits and studio tours for children's groups such as Cub Scouts and Girl Scouts. [See ¶¶ 31-34, supra]

c. **Programming Responsive To Ascertained Needs.**

135. WTVE aired numerous programs and PSAs addressing issues identified through its ascertainment process. These included News To You, For The People, Elderly Reports (Elderly Update), Informative Moment, Community Outreach, Community Calendar, Healthbeat, A Moment In Berks County History, Streetwise, In Touch, Medical Minutes, In Search of Missing Children, Pets of the Week, Spotlight 51, Post Script and In The Community Interest. Reading Ex. 8 at 3-4, 6; Reading Ex. 6 at 6. In addition, topics that affected the local area were addressed in legislative programs such as Legislative Journal and State House Perspectives, which were aired in the latter portion of the license term. Reading Ex. 8 at 6.

136. Children's ascertainment efforts led to the station's creation of the Kids Korner and Take 3 series in the latter portion of the license term. In addition, WTVE aired syndicated half-hour children's programs (Go For It, Adventure Pals, Candid Kids Club, Widget, Twinkle and Children's Room) to address children's issues identified in the station's ascertainment efforts. In addition, WTVE addressed children's issues by producing and airing PSA's

directed at those issues and establishing relationships with local children's organizations. [See ¶ 38 iv, supra]

137. Reading's quantitative showing (¶ 41, supra) demonstrates the following levels of issue-responsive programming during the license term:¹⁵

1989: 7% issue-responsive programming (average of 58.5 program minutes and 42 PSA minutes per day)

1990: 2.8% issue-responsive programming (average of 24.5 program minutes and 16.5 PSA minutes per day)

1991: 3.4% issue-responsive programming (average of 21.5 program minutes and 27 PSA minutes per day)

1992: 3.9% issue-responsive programming (average of 22 program minutes and 33.5 PSA minutes per day)

1993: 7.5% issue-responsive programming (average of 72.5 program minutes and 35.5 PSA minutes per day)

1994: 11.2% issue-responsive programming (average of 116.5 program minutes and 44.5 PSA minutes per day)

¹⁵ Adams presented its own quantitative analysis. See Adams Ex. 2 – Adams Ex. 7. However, that analysis excluded all programming identified in WTVE's program logs as a "PSA." [Boothe Testimony, Tr. 1217:11-1218:13] Accordingly, Adams' analysis omits all PSAs as well as all short-form (2-3 minute) public service segments such as Health Report, Take 3, The Informative Moment, News To You, Community Outreach, Kids Korner and Elderly Report. For instance, Adams' daily analysis for October 1, 1993 (Adams Ex. 7, p. 2) shows zero minutes of non-entertainment programs. However, the attached log for October 1, 1993 (Adams Ex. 7, pp. 5-12) shows that WTVE broadcast 47.5 minutes of 2-3 minute public service segments and 41 minutes of PSAs. WTVE's use of short form public programming is a matter of licensee discretion. See Revision of Programming and Commercialization Policies, 98 FCC 2d at 1087. Because Adams' quantitative analysis omits most of WTVE's issue-responsive programming, it is entitled to no weight.

138. Reading has shown that its improved performance in public service programming in the 1992-94 timeframe is attributable to its emergence from bankruptcy and its improved (although still unprofitable) financial condition. [Reading Ex. 5 at 1] In evaluating changes in performance, the Commission assesses the record as a whole but places the greatest weight on the performance considered to be the most probative of the station's likely future performance. See Harriscop of Chicago, Inc., 5 FCC Rcd 6383 (1990). Accordingly, the greatest weight is to be placed on WTVF's post-bankruptcy performance from 1992-94.

139. During the 1992-94 period, WTVF compiled issues and programs lists identifying, in exhaustive detail, the issues deemed important to the station's viewers and the station's programmatic responses. [Testimony of Kimberley G. Bradley (Reading Ex. 8), Appendices M-X] WTVF broadcast thousands of PSAs on behalf of a multitude of public service organizations, introduced new children's programming responsive to its children's ascertainment efforts, expanded its religious programming and introduced a series of state legislative reports that gave local legislators a forum for discussing issues that they deemed important to their constituents. [See ¶¶ 36-41, supra] WTVF received no written complaints about its programming policies, but did receive thanks from a variety of organizations. [Testimony of Kimberley G. Bradley (Reading Ex. 8), Appendix N at 14-23, Appendix O at 17-18, Appendix P at 33-38, Appendix Q at 235-52, Appendix S

at 221-27, Appendix U at 164, 168-73 and Appendix V at 48-57] WTVE received awards during the license term for best PSA campaign (once for WTVE's Reading Public Museum PSA and once for WTVE's Keystone Safety Belt Network PSA) and best documentary (Gravity Switchback Railroad). [Id. at 3-4, 8] On the other hand, Daniel Bendetti, a former program director and production manager for WTVE who was fired by the station in 1998 and now works for a competing station, testified that he was aware of negative comments from people in the community about the lack of local news programming on WTVE. [Bendetti Testimony, Tr. 1666:1-25, 1746:4-15, 1756:15-1757:10]

140. WTVE's performance is equivalent to the "substantial service" deserving of a strong renewal preference in Fox Television Stations, *supra*. Although quantitative analysis is only a starting point, WTVE aired more PSAs and, at the end of the license term, a similar amount of issue-responsive programming compared to the station in Fox Television Stations. See 8 FCC Rcd at 2377-82 (daily 30-minute newscast, weekly 30-minute public affairs show and average of 27 PSAs per day); see also Radio Station WABZ, Inc., 90 FCC 2d 818, 836-41 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. FCC*, 732 F.2d 756 (D.C. Cir. 1983) (half-hour daily average of issue-responsive programming, typically in five-minute segments, merits renewal expectancy); compare Simon Geller, 90 FCC 2d 250 (1982), *aff'd sub nom. Committee for Community Access v. FCC*, 737 F.2d 74 (D.C.

Cir. 1984) (no renewal expectancy where licensee did not ascertain community needs and aired less than 1% non-entertainment programming), and Harriscope, supra (no renewal expectancy where licensee, after format change, closed its studio, aired syndicated non-entertainment programming from 6-7 a.m. and a drastically reduced PSA schedule at undesirable time periods).

141. WTVE's quantitative performance is also comparable to or better than that of Philadelphia-area television and radio stations whose performance was reviewed by the Commission during the same time period. See Commercial Radio Stations Serving Philadelphia, Pennsylvania, 8 FCC Rcd 6400 (Audio Services Div. 1993) (Philadelphia-area radio stations alleged to devote 0.3% - 1.8% of their air time to issue-responsive programming); Commercial Television Stations Serving Philadelphia, Pennsylvania, 5 FCC Rcd 3487 (1990) (alleged issue-responsive programming ranged from 1 hour to 8.4 hours weekly).

142. WTVE aired short news segments and weather announcements, but did not air a half-hour or hourly local news program during the 1989-94 license term. Reading's President, Micheal Parker, testified that it was his judgment that the market served by WTVE, an unprofitable UHF independent station located near the fringe of the Philadelphia television market, would not support program-length newscasts on WTVE. [Testimony of Micheal Parker (Reading Ex. 5 at 1)] Viewers in WTVE's service area were

able to receive news programming from all of the major television network stations in Philadelphia, as well as multiple other television, cable, radio and newspaper outlets. [Id. at 2]

143. There is no requirement that a station provide a daily news program in order to qualify for a renewal expectancy. See, e.g., Metroplex Communications, Inc., 4 FCC Rcd 8149, 8152 (Rev. Bd.), rev. denied, 5 FCC Rcd 5610 (1989), aff'd sub nom. Southeast Florida Limited Partnership v. FCC, 947 F.2d 505 (D.C. Cir. 1991). Rather, the Commission's policy is to give broadcast licensees "flexibility to respond to the realities of the marketplace by allowing them to alter the mix of their programming consistent with market demand." Revision of Programming and Commercialization Policies, 98 FCC 2d at 1087. WTVE's programming mix is a matter of licensee discretion and the lack of a daily half-hour or hourly news show does not detract from the station's strong record of public service programming.

144. Likewise, there is no requirement that a station's programmatic responses to ascertained issues be presented in programs lasting a half-hour or more. Had the Commission deemed this a relevant factor, it would have indicated this in the Home Shopping Report and Order. To the contrary, the Commission ruled that presentation of public service programming in segments generally shorter than half an hour does not preclude home shopping stations from meeting their public service obligations. Home

Shopping Report and Order, ¶¶ 29-31. In addition, past Commission cases have awarded a renewal expectancy to stations based on short-form public service programming. See, e.g., Radio Station WABZ, Inc., 90 FCC 2d at 836-41.

145. Reading determined that, with a home shopping format, short-form issue-responsive programming is more effective than long-form programming because viewers will be less likely to switch channels if presented with short-form programming. [Parker Testimony, Tr. 849:2-850:17] This is precisely the type of editorial judgment that the Commission has left to the discretion of licensees. See Revision of Programming and Commercialization Policies, 98 FCC 2d at 1087. Accordingly, WTVE's renewal expectancy credit is not diminished by the fact that a substantial amount of WTVE's issue-responsive programming was short-form programming.

d. Reputation In The Community

146. Public witnesses who were questioned about their involvement with WTVE's public service activities corroborated WTVE's descriptions of those activities in its quarterly issues and programs lists. The public witnesses praised WTVE's cooperation in promoting their public service activities. [Kissinger Dep. (Reading Ex. 26 at 11), Witman Dep. (Reading Ex. 27 at 14), Watts Dep. (Reading Ex. 28 at 10-11), Caltagirone Dep. (Reading

Ex. 33 at 15), Didyoung Dep. (Reading Ex. 37 at 14-15), Dillard Dep. (Reading Ex. 39 at 12), Windbeck Dep. (Reading Ex. 41 at 18) WTVE received no written complaints about its coverage of local issues. WTVE did receive numerous letters of thanks from a wide variety of public service organizations. [Testimony of Kimberley G. Bradley (Reading Ex. 8), Appendix F at 9, Appendix H at 7-10, Appendix L at 11-12, N at 13-21, O at 17-18, P at 34-37, Q at 235-49, R at 275-76, S at 222-25, U at 164, 168-78, V at 48-57] The only contrary evidence presented by Adams was the anecdotal claim by Mr. Bendetti, a terminated WTVE employee, that people in the community complained to him about the lack of a local newscast on WTVE. This type of unverifiable, second-hand claim is entitled to little weight compared to the first-hand testimony of WTVE's public witnesses. See, e.g., Kimler Broadcasting, Inc., 15 FCC Rcd 7083, 7088 (1999). Again, the decision of what type of issue-responsive programming to air is within the licensee's discretion.

e. Compliance With FCC Rules and Policies

147. Reading complied with all applicable Commission rules and policies during the 1989-94 license term except for the reporting failures described in Reading Ex. 14. Those reporting failures included the failure to file a copy of the licensee's Management Services Agreement with Partel, Inc., the company owned by Mr. Parker. This agreement, which became

effective as of August 28, 1990, was reported in an amendment filed by Reading on February 7, 1992 in connection with its long-form transfer of control application and in 1997-99 ownership reports for Reading. [Reporting Failures, Reading Ex. 14] Section 73.3613 (c)(1) of the Commission's Rules (47 C.F.R. § 73.3613(c)(1) calls for the following agreements to be filed:

Management consultant agreements with independent contractors; contracts relating the utilization in a management capacity of any person other than an officer, director, or regular employee of the licensee or permittee; statement management contracts with any persons, whether or not officers, directors, or regular employees, which provide for both a percentage of profits and a sharing in losses; or any similar agreement.

148. Because the Management Services Agreement provided that Mr. Parker would become an officer of Reading, it is possible that Partel would not be deemed an independent contractor. Because the Management Services Agreement does not provide for a sharing of profits and losses, the agreement would not have to be filed if Partel were not deemed an independent contractor. However, the phrase "any similar agreement" could nevertheless be deemed applicable. Although the issue is not without ambiguity, it is reasonable to interpret Section 73.3613(c)(1) as requiring Reading to file a copy of the Management Services Agreement with the Commission. However, since the existence of the agreement was reported by

Reading during and after the license term, there is no basis to infer intentional concealment by Reading.

149. Reading Exhibit 14 also shows that Reading incorrectly listed certain officers and directors and omitted certain officers and directors in certain applications and ownership reports filed during the license term. However, Reading filed a correct listing in its annual ownership report filed on March 31, 1994, the last report of the license term. [Reporting Failures, Reading Ex. 14 at 2] Again, there is no basis to infer intentional concealment by Reading.

150. Reading's reporting failures are similar to, but much less serious than, the reporting failures described in Valley Broadcasting Co., 4 FCC Rcd 2611 (Rev. Bd. 1989), rev. denied, 5 FCC Rcd 499 (1990), aff'd sub nom. William H. Hernstadt v. FCC, 919 F.2d 182 (1990) (numerous reporting violations do not detract from station's strong renewal expectancy). Reading provided correct information concerning its officers and directors in the last ownership report filed during the license term and reported the existence of the Management Services Agreement in numerous filings, including one filing within the license term. In addition, there is some ambiguity as to whether the Management Services Agreement was required to be filed. Under these circumstances, Reading's reporting failures are not sufficiently material to detract from WTVE's claim to a renewal expectancy.

f. **Community Outreach**

151. The record shows that WTVE served as a forum for community outreach and self-expression in a number of respects. First, WTVE's staff dealt with numerous local organizations to seek PSAs and to seek participation in issue-responsive programs being produced by WTVE (e.g., In Touch, Community Outreach, Elderly Update, For The People and Around Our Town). Second, Rep. Caltagirone testified that WTVE did an exemplary job of providing an outlet for local legislators, something that newspapers and other television stations did not do. [Caltagirone Dep. (Reading Ex. 33 at 12-17)] Third, throughout the license term WTVE aired community calendar announcements of upcoming community events. [Testimony of Kimberley G. Bradley (Reading Ex. 8 at 3-4)] Fourth, WTVE provided a local forum through its man-on-the-street interview program. [Id. at 2] Fifth, WTVE's Take 3 program was produced by and featured local high school students, on topics that they selected in conjunction with their advisors. [Testimony of George Alan Mattmiller, Jr. (Reading Ex. 6 at 8)] Sixth, WTVE assisted local organizations in producing videotapes about their organizations or activities. Finally, WTVE's staff participated in numerous local community events on behalf of the station.

8. Comparative Conclusion

152. Reading is entitled to a dispositive comparative preference due to its strong renewal expectancy. Even if Reading did not receive the renewal expectancy credit, Reading's preferences for comparative coverage, local ownership, civic activities and past broadcast experience outweigh Adams' sole preference for diversification of media outlets.

B. Misrepresentation/Lack Of Candor Issue Against Reading – Phase II

1. The Legal Standard

153. A misrepresentation is a false statement of fact, whereas lack of candor involves a concealment, evasion, or some failure to be fully informative. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). In either case, intent to deceive is an essential element. See, e.g., *Weyburn Broadcasting Ltd. v. FCC*, 984 F.2d 1220, 1232 (D.C. Cir. 1993); *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1258 (D.C. Cir. 1991). Adams bears the burden of proving, by a preponderance of the evidence, each and every element of misrepresentation/lack of candor. Memorandum Opinion and Order, FCC 99M-49 (released October 15, 1999), ¶ 18 at 8; see Lucinda Felicia Paulos, 7 FCC Rcd 3145, ¶ 98 (ALJ 1992), *aff'd*, 8 FCC Rcd 8237 (Rev.

Bd. 1993); Cannon Communications Corp., 5 FCC Rcd 2695, ¶ 26 (Rev. Bd. 1990).

154. As demonstrated below, the record developed at the hearing on this issue demonstrates a complete absence of deceptive intent by Mr. Parker that would support a lack of candor finding against him. The representations at issue were made in reasonable reliance upon the advice of counsel and included all the information requested by the applicable forms. Furthermore, the conclusion that such conduct does not support a lack of candor finding is consistent with the Commission's past practice, policy, and precedent. For these reasons, Reading respectfully requests a finding in its favor on the lack of candor issue.

2. The Applications At Issue Are Complete And Accurate

a. The Applications provided all the information specified

155. Subsequent to the issuance of the previous decisions (i.e., final decisions in Religious Broadcasting and Mt. Baker), the Norwell Application, the Reading Application, the Twentynine Palms Application and the Dallas Application (collectively, the "Applications") were filed with the FCC. In each of the Applications, Question 7 was answered as follows:

7. Has the applicant or any party to this application had any interest in or connection with the following:

- | | Yes | No |
|---|-----|----|
| (a) an application which has been dismissed with prejudice by the Commission? | X | |
| (b) an application which has been denied by the Commission? | X | |
| (c) a broadcast station, the license of which has been revoked? | | X |
| (d) an application in any Commission proceeding which left unresolved character issues against the applicant? | | X |
| (e) if the answer to any of the questions in 6 or 7 is Yes, state in Exhibit No. _____ the following information: | | |
| (i) Name of party having such interest; | | |
| (ii) Nature of interest or connection, giving dates; | | |
| (iii) Call letters of stations or file number of application, or docket number; | | |
| (iv) Location. | | |

[See Norwell Application (Reading Ex. 46, Attachment E at E24); Reading Application (Reading Ex. 46, Attachment F at F12); Twentynine Palms Application (Reading Ex. 46, Attachment G at G9); Dallas Application (Reading Ex. 46, Attachment H at H10)]

156. Each applicant, having affirmatively answered that it (or another party to the application) had had an interest in or been connected with "an application which ha[d] been dismissed with prejudice by the

Commission” and “an application which ha[d] been denied by the Commission,” was then required to state in an attached exhibit: the name of the party having such interest; the nature of interest or connection, giving dates; the call letters of stations or file number of application, or docket number; and its location. [See Norwell Application (Reading Ex. 46, Attachment E at E24); Reading Application (Reading Ex. 46, Attachment F at F12); Twentynine Palms Application (Reading Ex. 46, Attachment G at G9); Dallas Application (Reading Ex. 46, Attachment H at H10)] As so required, each applicant attached the necessary exhibit and provided the specifically requested information; pertinent to the issue here, each of the exhibits contained virtually the same description of the Previous Decisions:

Although neither an applicant nor the holder of an interest in the application to the proceeding, Micheal Parker’s role as a paid independent consultant to San Bernardino Broadcasting Limited Partnership (“SBB”), an applicant in MM Docket No. 83-911 for authority to construct a new commercial television station on Channel 30 in San Bernardino, CA, was such that the general partner in SBB was held not to be the real party in interest to that applicant and that, instead, for purposes of the comparative analysis of SBB’s integration and diversification credit, Mr. Parker was deemed such. See e.g. Religious Broadcasting Network et al., FCC 88R-38 released July 5, 1988. MM Docket No. 83-911 was settled in 1990 and Mr. Parker did not receive an interest of any kind in the applicant awarded the construction permit therein, Sandino Telecasters, Inc. See Religious Broadcasting Network, et al., FCC 90R-101 released October 31, 1990.

* * *

In addition, Micheal Parker was an officer, director and shareholder of Mt. Baker Broadcasting Co., which was denied an

application for extension of time of its construction permit for KORC(TV), Anacortes, Washington, FCC File No. BMPCT-860701KP. See Memorandum Opinion and Order, FCC 88-234, released August 5, 1988.

[See Norwell Application (Reading Ex. 46, Attachment E at E30-31); Reading Application (Reading Ex. 46, Attachment F at F30); Twentynine Palms Application (Reading Ex. 46, Attachment G at G20-21); Dallas Application (Reading Ex. 46, Attachment H at H24-25)]¹⁶

157. Thus, the descriptions of the Previous Decisions were presented in the context of affirmative acknowledgments that each applicant (or a party to the application) had had an interest in or been connected with “an application which ha[d] been dismissed with prejudice by the Commission” and “an application which ha[d] been denied by the Commission.” [Applications, Question 7] Having so affirmed, the forms required the applicants to state the: “(i) Name of party having such interest; (ii) Nature of

¹⁶ Similar descriptions of the Mt. Baker decision had previously appeared in a 1989 Form 315 application involving KWBB(TV), San Francisco, California [see West Coast United Application (Reading Ex. 46, Attachment I)] and in two 1989 applications for low power television stations (the “1989 Applications”). None of the 1989 Applications, however, referenced the Religious Broadcasting decision. [Parker Testimony, ¶ 11 and n.1 (Reading Ex. 46); West Coast United Application (Reading Ex. 46, Attachment I)] Because these applications are more than ten years old, they appear to be beyond consideration (except for background information purposes) in trying the lack of candor issue. See Policy Regarding Character Qualifications In Broadcast Licensing, 102 FCC 2d 1179, 1229 (1986) (subsequent history omitted) (“as a general matter conduct which has occurred and was or should have been discovered by the Commission, due to information within its control, prior to the current license term should not be considered, and that, even as to consideration of past conduct indicating ‘a flagrant disregard of the Commission’s regulations and policies,’ a ten year limitation should apply”).

interest or connection, giving dates; (iii) Call letters of stations or file number of application, or docket number; (iv) Location.” Notably, none of the application forms in question here call for a description of the Commission’s decision regarding the dismissal or denial. Likewise, the forms do not ask for a citation to the FCC Record or any other reporter, nor to any FCC document number, where such decision might be found.

158. The Question 7 descriptions of the Previous Decisions provide all the information called for. Thus, the Religious Broadcasting description states (i) that Micheal Parker was the party to the application who had an interest in or connection with an previous application which had been dismissed / denied by the Commission; (ii) that his interest or connection was that of an independent contractor that had been found to be the real party in interest; (iii) the docket number – MM Docket No. 83-911; and (iv) the location – San Bernardino, California. Likewise, the Mt. Baker description states: (i) that Micheal Parker was the party to the application who had an interest in or connection with an previous application which had been dismissed / denied by the Commission; (ii) that his interest or connection was that of an officer, director and shareholder; (iii) the call letters and file number – KORC(TV), FCC File No. BMPCT-860701KP; and (iv) the location – Anacortes, Washington. It is beyond reasonable dispute that this information is accurate and responds fully to the question presented.¹⁷

¹⁷ After a thorough evaluation of the descriptions of the Previous Decisions, the ALJ previously found that the descriptions were “basically

159. Likewise, the Dallas Amendment was accurate. The Dallas Amendment, in accordance with Question 7, dealt with the status of Parker's applications at the time those applications were dismissed or denied. Clearly, a real-party-in-interest issue had been added against SBB, as was disclosed in the Dallas Application as originally filed. However, at the time the application was dismissed, the real-party-in-interest issue had been resolved favorably on qualifications grounds and unfavorably on comparative grounds. This interpretation is confirmed three ways:

- The Review Board's decision in Religious Broadcasting (3 FCC Rcd at 4090, ¶ 16, and 4103-04, ¶ 63) explicitly affirmed only the comparative element of the ALJ's holding and in its ordering clause made no distinction between SBB's application and the other applications denied on comparative grounds;
- The Review Board's decision in Doylan Forney, 3 FCC 6330, n.1 (Rev. Bd. 1988), stated that in Religious Broadcasting, "the Board affirmed the Presiding ALJ's finding that San Bernardino Broadcasting, whose real-party-in-interest was a Micheal Parker, was entitled to no integration credit"); and

accurate." See Memorandum Opinion and Order, FCC 99M-49, ¶ 21 at 10 (released September 3, 1999).

- The Review Board approved an \$850,000 settlement payment to SBB in 1990. See Religious Broadcasting, 5 FCC Rcd 6362 (Rev. Bd. 1990), and SL Communications, Inc. v. FCC, 168 F.3d 1354 (D.C. Cir. 1999) (affirming Commission decision rejecting proposed settlement involving a monetary payment to a party disqualified on real-party-in-interest grounds).

160. Thus, the Dallas Amendment correctly described the status of the Applications at the time those applications were dismissed or denied. At the time the SBB application was dismissed pursuant to a settlement, no character issue had been added or requested against SBB – rather, the real-party-in-interest issue had been resolved in the manner stated in the Dallas Application as originally filed. Clearly, given the disclosure of Religious Broadcasting in the original Dallas Application, there was no need to amend the Dallas Application other than to affirm that, as of the time each of Parker's applications were dismissed, there was no pending or requested character issue. The Dallas Amendment correctly stated that was the case.

- b. **Adams' contention that additional information is required beyond that specified by the Applications is not supported by clear notice such that an applicant could identify the necessity for such additional information with "ascertainable certainty."**

161. To the extent that that Adams contends that a complete answer to Question 7 actually requires additional information beyond that

specifically called for by the application forms (e.g., a description of the reasons for the Commission's decision regarding the dismissal or denial and citations to the FCC Record where such decision might be found), such a requirement is not supported by clear notice such that an applicant could identify the necessity for such additional information with "ascertainable certainty." In that regard, it has long been held that, when the Commission requires the submission of information by a license applicant, "elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected." Bamford v. FCC, 535 F.2d 78, 82 (D.C. Cir. 1975), cert. denied, 429 U.S. 895 (1976); see also Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 1985) ("The FCC cannot reasonably require applications to be letter perfect when, as here, its instructions for those applications are incomplete, ambiguous or improperly promulgated").

162. The clear notice requirement is not merely a principal of "basic hornbook law in the administrative context," but also a matter of Constitutional due process; thus, where the agency seeks to impose a sanction amounting to the deprivation of property (e.g., disqualification or forfeiture) as the result of a purported violation of agency regulations, the agency's interpretation must have been previously identifiable with ascertainable certainty. General Electric Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting Rollins Envir. Servs., Inc. v. EPA, 937 F.2d 649, 654

n.1, 655 (D.C. Cir. 1991) (Edwards, J., dissenting in part and concurring in part).

163. Earlier this year, a panel of the D.C. Circuit Court of Appeals reaffirmed and specifically applied the requirement of “ascertainable certainty” with respect to the Commission in Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000). There, the Court of Appeals stated:

Because “[d]ue process requires that parties receive fair notice before being deprived of property,” we have repeatedly held that “[i]n the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.” We thus ask whether “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform. . . .”

Trinity Broadcasting, 211 F.3d at 628 (internal citations omitted) (quoting General Elec., 53 F.3d at 1328-1329).

164. As discussed above, the application forms in question do not require a description of the reasons for Commission decisions regarding dismissal or denial, nor do they require citations to the FCC Record or other reporter (or even an FCC document number) where such decisions might be found. In fact, the Commission’s own regulations provide only that “[e]ach application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for

is inapplicable, in which case this fact shall be indicated.” 47 C.F.R. § 73.3517.

165. Thus, with respect to the issue of the descriptions of the Previous Decisions, there is simply no indication, express or reasonably implied, that an applicant is to describe, in addition to that information specifically requested, the content or holdings of the Commission decisions identified in Question 7. Moreover, in the context of proposed disqualification or other sanction, there is no basis for those applicants, or Parker, to have been aware to an ascertainable certainty that the failure to provide a more thorough description of the content or holdings of the Previous Decisions could lead to such a severe penalty as loss of a broadcast license.

166. With respect to the purported need for FCC Record citations, Adams has claimed that such a requirement derives from 47 C.F.R. § 1.14. Section 1.14 does state that “the appropriate reference to the FCC Record shall be included as part of the citation to any document that has been printed in the Record.” However, it is far from clear, let alone identifiable with ascertainable certainty, that Section 1.14 applies to the Applications, which were filed on FCC Form 314 and FCC Form 315. There is no clear indication in Section 1.14 or its history that it is intended to apply to applications (or, specifically, exhibits to applications).¹⁸ Even though Section

¹⁸ The Order adopting Section 1.14 refers only to the filing of “papers.” See Order, 14 FCC 2d 276 (1968), at ¶ 2 (“When *papers* are filed with the Commission which refer to a document published in the FCC Reports, Second Series, it is therefore, appropriate to require that references to those reports

1.14's reference to FCC Record citations (and the original Section's reference to the FCC 2d Reporter) has been in effect since 1968, both Form 314 and Form 315, despite having been repeatedly amended for other reasons, have never been amended to require citations to the official reporters where applicable. Reading is not aware of any prior decision that holds that Section 1.14 requires citation to the official reporter for information supplied in applications, nor is there any reported decision in which the Commission has imposed a sanction for failing to include citations to the official FCC reporter.

167. The purported obligation to include a description of the content or holding of the Commission's decision regarding the dismissal or denial and citations to the FCC Record is not identifiable with ascertainable certainty; accordingly, neither Mr. Parker nor the applicants may properly be held answerable for the alleged failure to include such additional information.

168. Yet, even if such additional information were deemed to be required, any failure to have included it cannot properly support a finding that Mr. Parker intended thereby to deceive the Commission.¹⁹ Specifically,

be included as part of the citation of that document" (emphasis added)). The term "papers" is a colloquial term for pleadings. See, e.g., WBBK Broadcasting, Inc., 15 FCC Rcd 5906 (2000) at ¶ 7.

¹⁹ Adams has previously argued that unofficial references to Commission decisions, unlike officially reported opinions, cannot be found "instantaneously in any library or through Lexis or Westlaw." (Adams' Consolidated Reply to Reading's Opposition and the Bureau's Comments to the Motion to Enlarge at 17.) It should be noted, however, that both the descriptions of the previous decisions give the respective order numbers – FCC 88-234 for Mt. Baker and FCC 88R-38 for Religious Broadcasting. A Westlaw search of these order numbers in the "Federal Communication

the descriptions of the Previous Decisions, including the absence of official reporter citations, must be read in the context of the entire Question 7. In that context, the answers to the question clearly advise the Commission that the previous decisions were made in connection with “an application which ha[d] been dismissed with prejudice by the Commission” or “an application which ha[d] been denied by the Commission.” (See Applications, Question 7(a & b).)

169. Under these circumstances, the alleged failure to include a more thorough description of the Previous Decisions or official reporter citations in addition to that identifying information specifically requested, cannot rise to the level of intentional deception which would support a lack of candor finding. Thus, past Commission decisions hold that intent to deceive cannot be inferred where, as here, the information in question is a matter of public record disclosed by the applicant.²⁰ Moreover, as demonstrated below, Mr. Parker relied on the determination of legal counsel as to the sufficiency of these descriptions.

Commission Decision” database gives 1 result for “FCC 88-234” and it is Mt. Baker, 3 FCC Rcd 4777 (1988) and 7 results for “FCC 88R-38” one of which is Religious Broadcasting, 3 FCC Rcd 4085 (Rev. Bd. 1988).

²⁰ See, e.g., California State University, Sacramento, 13 FCC Rcd 17,960, 17,964 (1998) (disclosure of loss of transmitter site in collateral application rebuts lack of candor claim where applicant failed to file a Section 1.65 amendment); Viacom Int’l, Inc., 12 FCC Rcd 8474 (MMB 1997); Seven Hills Television Co., 2 FCC Rcd 6867 (Rev. Bd. 1987) at ¶ 74 (subsequent history omitted); Telephone and Data Systems, Inc., 10 FCC Rcd 10,518 (ALJ 1995) at ¶ 16 and n. 22.